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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 213

JOSEPH LAWRENCE MARINO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

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Supreme Court of the United States

October 1956 Term

No.

JOSEPH LAWRENCE MARINO,

Petitioner,

—v—

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which affirmed his conviction for violation of Sections 173-174 of Title 21, and Section 371 of Title 18, United States Code, with respect to Counts II and IV of the indictment.

(a) The Opinion Below

The opinion of the court below have not yet been officially reported. A copy is hereto annexed (See p. 18 *infra*).

(b) Statement of the Ground of Jurisdiction

(i) The judgment of the Court of Appeals was rendered and entered on June 1, 1956.

(ii) The jurisdiction of this Court is invoked pursuant to 18 U. S. C. Rule 37; and 28 U. S. C. Section 1254.

(c) Questions Presented for Review

1. Does the decision of the Supreme Court of the United States in *U. S.* v. *Costello,* 350 U. S. 359 promulgate a new rule of evidence in criminal trials permitting relevant hearsay evidence.

2. Does the decision of the Supreme Court of the United States in *U. S.* v. *Costello* (*supra*), promulgate a new rule of evidence in criminal trials permitting irrelevant hearsay testimony as held by the Court below in the instant case.

3. May a conviction be sustained against a defendant who has never before been convicted or even arrested; where hearsay and triple hearsay (Trial Judge characterization) is introduced before the jury by the Government to the effect that a Government Agent heard on occasions informer say that the petitioner was a dealer in narcotics as part of the Government's case in chief (p. 56a).

4. May a conviction be sustained where a Government Agent testifies that an informer told him that the informer had heard from a bartender that the petitioner was a narcotics dealer (p. 57a).

Reference to pages are to pages in Appendix of Petitioner in Court below.

5. May a conviction be sustained where the defense in the context of its cross-examination had endeavored to find out if the Agent, as a result of his investigations, had found any proof of any connection between the petitioner and a supplier of narcotics or between the petitioner and any persons connected with the narcotic traffic and the Agent testified that he had not found any such connection and thereafter on re-direct examination by the U. S. Attorney, was it proper, under the cloak of attempting in the language of the Court below "to oppose these tactics of defense" to introduce "whatever evidence the prosecution developed along this line" irrespective of whether or not the evidence was incompetent, irrelevant and hearsay of other crimes.

6. Can the Government, obviously for the purpose of creating prejudice and bias, introduce evidence tending to show criminals frequented the restaurant in which the petitioner worked; that the petitioner's brother-in-law was once arrested, although never convicted; and that the petitioner's sister may have had an affair with a colored man (p. 72a).

7. Can a conviction be sustained where the U. S. Attorney questions the informer and asks him whether or not he, the informer, made purchases of narcotics from persons, not the petitioner, or anyone alleged as acting in concert with the petitioner and that delivery took place in the restaurant where the petitioner was employed (p. 31a).

8. May a Trial Court sit by and permit petitioner's constitutional rights to be frittered away and thus deny the petitioner a fair trial under the Constitution.

9. May a jury find a petitioner guilty of the crime of conspiracy where none of the elements of the crime are present on the theory that jury verdicts can be rationally inconsistent.

(d) Statutes Relied On

Section 174 of Title 21, United States Code, provides, in pertinent part, as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years."

Section 371 of Title 18, United States Code, provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

(e) Statement of Case

Petitioner was indicted in an indictment containing four counts. Three of the counts allege sales of heroin on July 17th, October 1st and October 22nd, 1954; and one count alleges conspiracy to sell narcotics. After a trial before the Honorable William B. Herlands, U. S. District Court Judge and jury, petitioner was convicted of the sale of October 1st, and a conspiracy to sell narcotics; and acquitted of the sales of July 17th and October 22nd, 1954.

A special employee (informer) testified that he and the agent went to the restaurant where petitioner worked on July 17th, 1954 and purchased from a woman a package containing heroin and paid her $510.00.

The special employee and the agent also testified that on October 1st, 1954 they went to the same restaurant and ordered five ounces of heroin from petitioner, who told them to look in the phone booth where they would find a package containing heroin. The informer claims he paid petitioner $650.00.

The special employee alone testified that on October 22, 1954 that he ordered from petitioner five ounces of heroin that was given to him by two strangers and that he paid them $650.00.

A raid was made by more than twenty police officers on October 22, 1954 immediately after the informer gave the signal and not one penny of the money that was allegedly paid nor an ounce or trace of any narcotics was found in the restaurant. A thorough fingerprint search of all the packages containing heroin indicated that none of petitioner's fingerprints were on any of the packages. Peti-

tioner took the stand and stated he was innocent. A great deal of the testimony was so incredible and so contradictory so as to conclusively demonstrate petitioner's innocence.

Petitioner had never been arrested for any crime, had been steadily employed and had led an exemplary life.

The defense was that the informer had made the sales on his own account to the Government.

The Government witnesses were the informer, an agent who was with informer part of the time and an agent who testified as to investigations.

On cross-examination of this last witness, petitioner's trial attorney asked if there was any proof connecting petitioner with any source of supply. The agent replied that there was none, and on the following day the agent came into the Court and said he wished to change his answer from "no" to "yes".

The Assistant U. S. Attorney then asked the agent, "Will you tell us what you heard that in any way connected the defendant with narcotics".

This question by the U. S. Attorney was not proper and elicited the prejudicial hearsay testimony found on pp. 56a, 57a; 72a of the Appendix in the Court below.

The Court below affirmed because "the issue was initiated and pressed by petitioner as the very basis of his case to show that he was not the type of young man to engage in the illegal transactions alleged; and whatever evidence the prosecution developed along this line was only such as was proper to oppose these tactics of defense".

(f) Jurisdiction of the Court Below

The District Court had jurisdiction under 26 U. S. C. §145(b). The Court of Appeals had jurisdiction under 28 U. S. C. §1291.

(g) Reasons Relied On

As to Questions 1, 2, 3 and 4:

The Court below has rendered a decision in conflict with every other Court of Appeals, with all State Courts, with every text writer and is even in conflict with its own decisions. It based its decision on the *Costello* case (*supra*), which, if the doctrine of this case stands, will allow the introduction of hearsay evidence in criminal trials, even as far as proof of other crimes where intent, identity, etc., are not necessary elements of the crime.

Prior to the *Costello* case, it was the universal rule in every Court that hearsay evidence was not admissible and certainly not hearsay evidence of other crimes where intent, etc, were not necessary elements of the crime.

A plethora of citations could be given this Court, but are hardly necessary for such an obvious statement of law. As a matter of fact, the Second Circuit has this to say in *U. S.* v. *Sansone*, 206 F 2d 86: "That hearsay as to other crimes required a reversal even though the Judge told the jury to disregard the testimony". In the instant case there was no such instruction.

As to Question 5:

The Court below has rendered a decision in direct conflict with decisions of other Courts of Appeals, in direct

conflict with every leading State case and in direct conflict with every text writer.

The Court below affirmed because "The issue was initiated and pressed by the petitioner as the very basis of his cause; that he was not the type of young man to engage in the illegal transactions alleged and whatever evidence the prosecution developed along this line was only such as was proper to oppose these tactics of defense."

Apparently, the theory of the Court below was that the "door had been opened" by the petitioner and that thereafter the Government had the right to introduce testimony regardless of whether or not it was competent, relevant or hearsay or even hearsay of other crimes.

It is the contention of the petitioner that he did not "open the Door" when in the context of his examination he asked for proof as to any connection between petitioner and any supplier or source of narcotics or any connection between the petitioner and any persons connected with the narcotic traffic.

The theory of completeness merely entitled the Government to offer proof "in combatting these tactics of defense" showing the connection between petitioner and any narcotics or source of supply.

Arguendo that the doctrine of completeness permits an offer of proof of "whatever evidence the prosecution developed along this line", does that allow, under the *Costello* case, the introduction of incompetent, irrelevant and hearsay and hearsay of other crimes.

Dean Wigmore (Evidence, 3rd Edition, Section 2113) in an exposition of the law that has found universal ac-

ceptance states the rule as follows: "The right of the opponent to put in the remainder is universally conceded, for every kind of utterance without distinction; and the only question can be as to the scope and limits of the right.

The ensuing controversies are in effect concerned merely with drawing the line so that the opponent shall not, under the cloak of this conceded right, put in utterances which do not come within its principle and would be otherwise irrelevant and inadmissible. In the definition of the limits of this right, there may be noted three general corollaries of the principle on which the right rests, namely:

"(a) No utterance, irrelevant to the issue, is receivable.

(b) No more of the remainder of the utterance than concerns the same subject and is explanatory of the first part, is receivable.

(c) The remainder thus received merely aids in the construction of the utterance as a whole and is not in itself testimony."

A very good statement of the rule was given by the Court of Appeals of the State of New York in *People* v. *Schlessel*, 196 N. Y. 476:

> "There is no tenable theory of 'opening the door' which sanctions the reception of evidence neither relevant to the issue nor to facts in issue".

It is humbly suggested that the Court below was confused by the brief of the Government that the petitioner was "attempting to establish through a Government Agent, his unblemished reputation".

Dean Wigmore, in Section 1849 of his treatise on Evidence, states the universal rule which can be found on

page 19 of Petitioner's Brief in the Circuit Court of Appeals. The authorities are collected on pages 19 to 24.

These authorities establish the rule that character can only be put in issue by a defendant when he introduced affirmative proof of good character; that such character evidence requires a necessary predicate and must be based on reputation and not on specific acts.

The attorney for petitioner was not asking testimony of petitioner's character of someone who was incapable and unable to testify as to petitioner's character (the Government agent) and the Government is in error when it presupposes that character evidence can ever be introduced without a proper predicate.

The Government has sought to justify the introduction of this hearsay of other crimes by a question out of context with 1500 other pages of testimony. That question was "When you went there, you found nothing detrimental about the character of the defendant, did you? Answer: No, sir."

A long line of questioning before this had sought to confine the agent to proof. Petitioner's attorney in the Trial Court had asked for proof connecting petitioner with any source or supplier of narcotics. This did not call for a hearsay answer. If the petitioner was a dealer in narcotics it could very well have been within the realm of proof for the investigator to definitely connect up the petitioner with the narcotics dealer or supplier.

The petitioner's attorney, at the trial, limited the answer called for to those other than Government Agents

or Special Employees. (See page 51a of Appendix to Appellant's Brief.)

Actually, the Agent was confined "to other than law enforcement officers that were working on this case and any other people that were assisting us" (See page 16a of the Appendix to Brief of the United States of America.) Certainly the hearsay as to other crimes of informers could not be urged by the Government on the theory of completeness.

May I also humbly suggest to this Court that in the trial lasting many, many days and containing 1418 pages of testimony an inadvertent question by a trial counsel should not be made the basis of destroying our concepts of a fair trial especially in view of the fact that the entire line of questioning had asked for proof.

As to Question 6:

If some of this record seems incredible, may we humbly suggest to this Court that this trial actually occurred and that the evidence itemized in Question 6 was actually introduced in the trial of this case.

It is hardly necessary to characterize this evidence before this learned Court. It is hardly necessary to cite cases that this constituted a deprivation of petitioner's constitutional rights to a fair trial.

As to Question 7:

The obvious reason for the Assistant U. S. Attorney asking the informer whether he made purchases from persons other than the petitioner and not connected with the petitioner but at the place where the petitioner worked,

was to attempt to create prejudice and bias so as to deny petitioner the right to a fair trial.

This issue was not initiated and pressed by the petitioner and was obviously plain and prejudicial error, but the lower Court maintained that no exception was taken of this plain and prejudicial error.

The Supreme Court in *Viereck* v. *U. S.*, 318 U. S. 236, at page 248, has stated the rule of law that the integrity of the judicial progress requires where the liberty of a citizen is involved and the fault in the trial is so radical, that it may well be noticed and corrected by the Court without objection, exception or assignment.

As to Question 8:

If this Court is so-minded and does grant Certiorari in this case, attorney for the petitioner herein can demonstrate to this Court that in more than 100,000 criminal trials instituted yearly in the City of New York, less than 10% have paid counsel. The others are either assigned without fee, or are Legal Aid Society defense counsels. We do not attempt to imply that these members of the Bar do not do their best for these clients, or that the members of the Legal Aid Society do not conscientiously and earnestly try to defend these men to the best of their ability, but in the nature of things, it is impossible to defend 10 or 12 clients each day adequately without proper preparation, and in 90% of the cases in the City of New York this is how a defendant's rights are protected.

In the instant case the questions asked by the defense attorney were so highly improper and prejudicial that it

was the duty of the Court as in *U. S.* v. *Katz*, 78 Fed. Supp. 35 at 439, to see that a fair trial was given petitioner.

As far as petitioner's attorney's experience in most Courts, the procedure adopted by Judge Murphy in *U. S.* v. *Katz* (*supra*) should be made mandatory, "Defense counsel thus injected the fact that defendant had been charged with another crime. It should not have been developed. We excused the jury and admonished defense counsel. The jury was then recalled and instructed that defendant was to be tried on the charge before them and that charge alone."

This Honorable Court has stated the same rule in *Querica* v. *U. S.*, 289 U. S. 466 at 469.

Probably the most important question in this whole appeal is this practical question, since 90% of all defendants in criminal trials have only token counsel to comply with constitutional requirements. The obvious reason, of course, is that most people charged with crime have no money to pay counsel. Practically lack of money means that a defendant is deprived in many cases of his constitutional rights to a fair trial. Practical considerations may make it impossible to judge each case on whether defense attorney did an adequate job, but at least this Court ought to rule that a Trial Judge may not sit by and allow a defendant's rights to be impaired and infringed.

In *U. S.* v. *Ragen*, 166 F 2d 976 at 980, Circuit Court of Appeals for the 7th Circuit said: "Whenever the Court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. * * *

The constitutional requirements have been met as to the necessity for counsel. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty on justice, such conduct might be considered on the proposition that such a trial was a denial of due process."

As to Question 9:

It is most humbly suggested to this Court that the Court below was in error in presupposing that petitioner urged that the conspiracy count was inconsistent. Rather, petitioner urged that the elements of the conspiracy count were not present. It is in the nature of things impossible for a man to conspire with himself (Cardozo, *J.*, in *Morrison* v. *California*, 291 U. S. 82).

Under the first count of the indictment alleging a substantive crime of sale charging the petitioner with one Jane Doe as acting in concert, the petitioner was acquitted.

As to the third count of the indictment charging the petitioner alone with a substantive crime of sale, the petitioner was acquitted.

Under the second coun of the indictment charging the petitioner alone with a sale, he was convicted.

There is no other evidence in this case to support the contention that any persons conspired or had an agreement to sell narcotics except for the first count for which petitioner was acquitted.

It is humbly submitted that the acquittal was *res judicata* on that issue. *Sealfon* v. *U. S.*, 322 U. S. 575.

The Government, in its brief to the lower Court, stated its opinion: "That the jury, in rendering its verdict on two counts alone, was expressing its decision not to base a conviction upon the testimony of the special employee uncorroborated by the testimony of a narcotics agent."

The testimony under the second count does not prove that petitioner acted in concert with anyone nor was there any proof of a conspiracy, an agreement, combination or confederation to sell narcotics. Agreed that there need not be any rational consistency in the verdicts of a jury, but a jury may not convict unless the essential elements of the crime are proved beyond a reasonable doubt.

In this particular case, the point raised by the petitioner was that none of the elements of a conspiracy were alleged or proved.

CONCLUSION

It is respectfully submitted that the various questions raised are of such fundamental importance in the demonstration of criminal law that there should be an authoritative determination of the same by this Court.

Accordingly, petitioner asks that this Court issue a Writ to Review the Judgment of Affirmance herein.

Respectfully submitted,

ARNOLD SCHILDHAUS
Counsel for Petitioner

Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 383—October Term, 1955.

(Argued May 11, 1956 Decided June 1, 1956.)

Docket No. 23937

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOSEPH LAWRENCE MARINO,

Defendant-Appellant.

Before:

CLARK,

Chief Judge,

FRANK and HINCKS,

Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, William B. Herlands, *Judge.*

Joseph Lawrence Marino appeals from his conviction for selling and conspiring to sell heroin. Affirmed.

Appendix

DENNIS C. MAHONEY, Asst. U. S. Atty. for the Southern Dist. of N. Y., New York City (Paul W. Williams, U. S. Atty., New York City, on the brief), *for plaintiff-appellee.*

HERBERT S. SIEGEL, New York City, *for defendant-appellant.*

PER CURIAM:

Since there was ample evidence to support defendant's conviction for selling heroin and conspiring to violate the federal narcotic laws, he centers his attack on this appeal on a claim of error in the admission of "hearsay" of other crimes of defendant. Admittedly no exception was taken at the trial; he now asks us to take note of it as plain and prejudicial error. But the issue was initiated and pressed by the defendant as the very basis of his case to show that he was not the type of young man to engage in the illegal transactions alleged; and whatever evidence the prosecution developed along this line was only such as was proper to oppose these tactics of defense. Defendant obviously was entitled to pursue this course when he thought it beneficial, and cannot now complain if it was not successful.

But one other matter deserves mention: a claim of alleged inconsistency in the conviction on the conspiracy count, while the jury found for defendant on two of the three substantive counts alleging sales of the drug. We need not stop to consider whether or not the jury's actions are subject to a practical rationalization, since it is well settled that it is not the function of appellate review to look for or require rational consistency between verdicts of a jury. See *United States* v. *Costello,* 2 Cir., 221 F. 2d 668, 676, citing cases, affirmed *Costello* v. *United States,* 350 U. S. 359.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of June one thousand nine hundred and fifty six.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. CARROL C. HINCKS,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

JOSEPH LAWRENCE MARINO,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

Judgment

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk